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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 697

ALFRED ROMERO AND GLORIA J. ROMERO,
Petitioners,

vs.

TEN EYCK-SHAW, INC.,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the United States

Brief for Respondent in Opposition

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OPINIONS OF COURTS BELOW

The opinion of the United States District Court for the District of Nevada is not reported. The Findings of Fact and Conclusions of Law filed by the court appear in the appendix (A. 1).

The opinion of the United States Court of Appeals for the Ninth Circuit, No. 21850, is not yet reported, and appears in the appendix (A. 6).

JURISDICTION

No basis for jurisdiction of this Court to review the judgment in question by Writ of Certiorari appears from USC, Title 28, Section 1254, and Rule 19(b) of this Court.

QUESTION PRESENTED FOR REVIEW

Whether the statutes of Nevada, the state of employment and injury, NRS Chapter 616, which provide that a subcontractor's injured employee, who accepts and receives medical benefits and compensation under the Nevada Industrial Insurance Act, has no common law action on account of such injury against the principal contractor and statutory employer are applicable to bar this action against the principal contractor in Federal Court by the subcontractor's injured employee who alleges that he is a citizen of Arizona.

STATUTES INVOLVED

The Statutes involved are:

Nevada Revised Statutes, Vol. 19:

Page 19189	NRS 616.085	(A. 10)
Page 19189	NRS 616.090	(A. 10)
Page 19189	NRS 616.105	(A. 10)
Page 19190	NRS 616.115	(A. 10)
Page 19199	NRS 616.260	(A. 10)
Page 19200	NRS 616.270	(A. 11)
Page 19207	NRS 616.370	(A. 11)

Arizona Revised Statutes Annotated, Vol. 8:

Page 215	Sec. 23-901	(A. 11)

STATEMENT OF THE CASE

Respondent, Ten Eyck-Shaw, Inc., adopts the Findings of Fact of the United States District Court for the District of Nevada, (A. 1, 2), as its statement of the case.

In the interests of clarity, we submit the Petitioner commenced "this action pursuant to the Arizona Workmen's Compensation Act being Title 23, Chapter 6 of Arizona Revised Code, and Article 18, Section 8 of the Constitution of the State of Arizona", not pursuant to Title 13, Chapter 6 of Arizona Revised Statutes, as stated in Petition, page

5; and that on December 23, 1966, not on November 21, 1966, as stated in Petition, page 5, the Motion to Dismiss was denied without prejudice to file a Motion for Summary Judgment.

ARGUMENT

In his Argument, page 6 of Petition, Petitioner relies upon Arizona Revised Statutes, Sec. 23-904:

> "(a) If a workman who has been hired or is regularly employed in this state receives a personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though the injury was received without the state."

We respectfully submit that the Arizona Revised Statute above cited refers to an award of compensation that may be made by the Arizona Industrial Commission. Arizona Revised Statutes, Sec. 23-901, Definitions, states:

> "In this chapter, unless the context otherwise requires:
>
> 1. 'Award' means the finding or decision of the commission of the amount of compensation or benefit due an injured employee or the dependents of a deceased employee.
>
> 2. 'Commission' means the industrial commission of this state.
>
> 3. 'Compensation' means the compensation and benefits provided by this chapter."

In the case at bar, we are not concerned with whether a subsequent award of compensation may be made by the Industrial Commission of the State of Arizona pursuant to Arizona Revised Statutes, Sec. 23-904(a), or with the facts involved in *Industrial Commission of Wisconsin v. McCartin* (1947), 330 U.S. 622, 67 S.Ct. 886, (cited by Petitioner in Petition, page 6, as 330 U.S. 662).

Essentially, the question here is whether the subcontractor's injured employee may maintain an action for personal injuries against the principal contractor in Federal Court, when an action for personal injuries against the principal contractor and statutory employer by a subcontractor's injured employee is barred by the law of the state of Nevada where the injury occurred.

The Court below held that the District Court correctly applied Nevada law and Romero has no cause of action against Ten Eyck-Shaw, Inc. The Court observed that Arizona's Workmen's Compensation plan is very similar to Nevada's, and also prevents a suit for damages at common law if the employee has not waived coverage under the Arizona Act before receiving his injuries. The Court also stated that "Appellants do not reveal exactly why they believe that the application of Arizona law would give them a cause of action in this case." (A. 7)

There is little dispute as to the facts in this case. The Petitioner admits that Romero has no cause of action against the principal contractor, Ten Eyck-Shaw, Inc., under Nevada law. It is apparent that the United States Court of Appeals for the Ninth Circuit did not err, under the law, in affirming the decision of the United States District Court for the District of Nevada.

Respondent respectfully prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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(Appendix Follows)

Appendix

In the United States District Court
for the District of Nevada

Civil No. 907

Alfred Romero and Gloria J. Romero, Husband and Wife,
Plaintiffs

vs.

Ten Eyck-Shaw, Inc., XYZ corporations 1 through X, and John Doe 1 through X,
Defendants

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. The Defendant, a Texas corporation, entered into a contract for the construction of a bank and garage building in Las Vegas, Nevada, in June, 1964.

2. Guy Apple Masonry Contractors, Inc., an Arizona corporation, entered into a subcontract with Defendant to perform certain masonry work for the Defendant on the bank job in November, 1964, and thereafter furnished labor and materials for said work between January, 1965, and February, 1966.

3. The masonry subcontractor filed with the Nevada Industrial Commission a report as an employer for the payroll period January, 1965, through March, 1965, reporting that Plaintiff was one of its employees during that period.

4. On or about January 27, 1965, Plaintiff was injured within the course and scope of his employment on the said bank and garage building.

5. The masonry subcontractor reported the injury to the Nevada Industrial Commission and Plaintiff filed a

claim with the Commission and has received in excess of $6,000.00 by way of compensation and medical expenses.

6. The masonry subcontractor did not make a claim for exemption from the provisions of the Nevada Act.

7. Plaintiff did not seek compensation under the Arizona Workmen's Compensation Act nor did Plaintiff commence an action in tort in Arizona but, alleging diversity of citizenship and the jurisdictional amount, commenced this action against the Defendant for damages for personal injuries.

8. Defendant moved to dismiss. The motion was denied without prejudice to a motion for summary judgment. The motion for summary judgment was filed by the Defendant, argued to the Court and submitted this 20th day of March, 1967.

Conclusions of Law

1. There is no genuine issue or material fact and Defendant is entitled to summary judgment as a matter of law.

2. The Nevada Industrial Insurance Act and not the Arizona Workmen's Compensation Act governs this case and this would be true if this action were commenced in the Nevada State Court, the Arizona State Court or the United States District Court for the District of Arizona.

If, as Plaintiff contends, the masonry subcontractor had complied with and was in good standing under the Arizona Act and had brought some twenty employees, including Plaintiff, to Nevada for the bank job, the masonry subcontractor could have become exempt from the Nevada Act under *NRS 616.260,* which reads:

> "1. Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this chapter while such employee is temporarily within this state doing work for his employer if such employer has furnished industrial insurance coverage under the industrial insurance act or similar

laws of a state other than Nevada so as to cover such employee's employment while in this state, provided:

"(a) The extraterritorial provisions of this chapter are recognized in such other state; and

"(b) Employers and employees who are covered in this state are likewise exempted from the application of the industrial insurance act or similar laws of such other state.

"The benefits under the industrial insurance act or similar laws of such other state shall be the exclusive remedy against such employer for any injury, whether resulting in death or not, received by such employee while working for such employer in this state.

"2. A certificate from the duly authorized officer of the industrial commission or similar department of another state certifying that the employer of such other state is insured therein and has provided extraterritorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carried such industrial insurance."

In such a case, Plaintiff could have sought compensation under the Arizona Act or, if he desired, reject compensation under the Arizona Act and sue the Defendant in the State or Federal Courts, either Nevada or Arizona Constitution, Article 18, Section 8).

ARS 23-904 provides:

"A. If a workman who has been hired or is regularly employed in this state receives a personal injury by accident arising out of and in the course of such employment, he shall be entitled to compensation according to the law of this state even though the injury was received without the state.

"B. If a workman who has been hired without this state is injured while engaged in his employer's business, and is entitled to compensation for the injury under the law of the state where he was hired, he may enforce against his employer his rights in this state if

they are such that they can reasonably be determined and dealt with by the commission and the courts in this state."

Under the Arizona Workmen's Compensation Act, like the Nevada Industrial Insurance Act, the prime contractor is made statutory employer of the subcontractor's employees (see *ARS 23-902* and *NRS 616.085*).

But the masonry subcontractor did not seek such exemption but, on the contrary, fully complied with the Nevada Industrial Insurance Act, as had the Defendant, the general contractor.

NRS 616.270 provides:

"1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

"2. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided."

NRS 616.370 provides:

"1. The rights and remedies provided in this chapter for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive, except as otherwise provided in this chapter, of all other rights and remedies of the employee, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury.

"2. The terms, conditions and provisions of this chapter for the payment of compensation and the

amount thereof for injuries sustained or death resulting from such injuries shall be conclusive, compulsory and obligatory upon both employers and employees coming within the provisions of this chapter."

3. Plaintiff asks this Court to disregard the Nevada statute, which bars this action, and to apply the Arizona statute. This Court believes that the Nevada statute governs here and that this would be true whether this action was commenced against the Defendant in Arizona or Nevada, in the State or Federal Courts. The Arizona Workmen's Compensation Act has no application to this action. *Williamson v. Weyerhaeuser Timber Company,* 9 Cir., 1955, 221 F.2d 5; *Home Indemnity Company of New York v. Poladian,* 4 Cir., 1959, 270 F.2d; 156; *Simon Service Incorporated v. Mitchell,* 73 Nev. 9, 307 P.2d 110 (1957); *Titanium Metals Corp. of Amer. v. Eighth Jud. Dist. Ct.,* 76 Nev. 72, 75, 349 P.2d 444 (1960).

Dated: March 20, 1967.

/s/ Roger D. Foley
Roger D. Foley
United States District Judge

United States Court of Appeals
for the Ninth Circuit

No. 21,850

Alfred Romero and Gloria J. Romero,
Appellants,

vs.

Ten Eyck-Shaw, Inc.
Appellee.

[August 28, 1968]

Appeal from the United States District Court
for the District of Nevada

Before: MERRILL and DUNIWAY, Circuit Judges, and CRARY, District Judge*

DUNIWAY, Circuit Judge:

This in an appeal from a decision of the United States District Court for the District of Nevada, which entered summary judgment for the defendant. Jurisdiction is based upon diversity of citizenship. We affirm.

Alfred Romero, one of the appellants, was injured while working on a construction project in Nevada. The appellee, Ten Eyck-Shaw, Inc., was the general contractor for the project. Romero alleges that Ten Eyck's negligence was the cause of his injuries. Romero was employed by Guy Apple Masonry Contractor, Inc., a citizen of Arizona and a sub-contractor for Ten Eyck. There is some dispute as to

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*Honorable E. Avery Crary, United States District Judge, Central District of California, sitting by designation.

whether the contract whereby Romero was hired by Guy Apple was made in Arizona or in Nevada. In the absence of a finding on this point by the district judge, and because we are reviewing a summary judgment against Romero, we will assume that, as Romero contends, the contract was made in Arizona. The contract between Ten Eyck and Guy Apple was orally agreed upon in Nevada. The written contract was signed by Ten Eyck in Texas, mailed to Guy Apple, and signed by Guy Apple in Arizona.

Under the workmen's compensation system of Nevada, sub-contractors and their employees are deemed to be employees of the principal contractor. N.R.S. Sec. 616.085. An employee entitled to recover workmen's compensation in Nevada may not seek any other relief against his employer. N.R.S. Sec. 616.270. Romero has been awarded $6,184.67 as medical benefits and compensation by the Nevada Industrial Commission. Therefore, if Nevada law is applicable, Romero has no cause of action against Ten Eyck. *Tab Construction Co. v. Eighth Judicial Dist. Ct.*, 1967, 83 Nev. ....., 432 P.2d 90, and see *Titanium Metals Corp. of Amer v. Eighth Judicial Dist. Ct.*, 1960, 76 Nev. 72, 349 P.2d 444; *Simon Service Inc. v. Mitchell*, 1957, 73 Nev. 9, 307 P.2d 110.

Arizona's workmen's compensation plan is very similar to Nevada's. A.R.S. Sec. 23-902(B) makes employees of subcontractors employees of the general contractor for this purpose. Arizona also prevents a suit for damages at common law if the employee has not waived a coverage under the Arizona Act before receiving his injuries. A.R.S. Sec. 23-906. Appellants do not reveal exactly why they believe that the application of Arizona law would give them a cause of action in this case. But see *Tab Construction Co. v. Eighth Judicial Dist. Ct., supra,* 83 Nev. at ....., 432 P.2d at 91. However, we need not decide what the effect of applying

Arizona law in this siutation would be because the district court correctly applied Nevada law.

The proper function of federal courts in diversity cases with respect to choice of law problems "is to ascertain what the state law is, not what it ought to be." *Klaxon Co. v. Stentor Co.*, 1941, 313 U.S. 487, 497. Here, that means the Nevada law, the law of the forum state. The recent decision of the Nevada Supreme Court in *Tab Construction Co., supra,* on facts remarkably similar to this case, held that there was no compelling reason not to apply Nevada law. Relevant reasons cited by the court for applying Nevada law were that Nevada was the forum state, the place of residence of the general contractor, the place of the work injury, the place where the general contractor's business was localized, and the place where the employees worked. There are several ways in which the present case is similar. Here, as in *Tab Construction Co.,* the plaintiff employee was a citizen of Arizona and the subcontractor that employed him was an Arizona corporation. Here, as there, the general contractor was doing work in Nevada and complied with Nevada's workmen's compensation plan. Here, as there, Nevada is the forum state, the contract contemplated work there, the work was done there, and the injury occurred there. The principal difference is that Ten Eyck is a Texas corporation, not a Nevada corporation, and does not have its principal place of business in Nevada. Thus it is not a "resident" of Nevada. In both cases, the general contractor's only connection with Arizona is that it hired an Arizona subcontractor. Here, it appears that the subcontract and Romero's contract were made in Arizona. Whether this was also true in *Tab Construction Co.* does not appear. We regard these differences as of minor significance. We find nothing in the Nevada decisions that convinces us that

they would induce Nevada to apply Arizona law here. On the contrary, we think that here as in *Tab Construction Co.*, "all of Nevada's relevant policies of workmen's compensation are vitally involved" (83 Nev. at ....., 432 P.2d at 92).

Nor does the full faith and credit clause require that Nevada apply Arizona law here. Generally, in workmen's compensation cases, either the state where the injury occurred, *Pacific Employers Inc. v. Industrial Accident Commission,* 1939, 306 U.S. 493, or the state where the employment contract was made, *Carroll v. Lanza,* 1955, 349 U.S. 408; *Alaska Packers Assoc. v. Industrial Commission,* 1935, 294 U.S. 532, may apply its own law. Nevada is the state where the injury occurred. We think that it may, and that it would apply its own law here.

AFFIRMED.

STATUTES INVOLVED

The Nevada Industrial Insurance Act provides:

NRS 616.085 "Employee and workman": Subcontractors and employees. Subcontractors and their employees shall be deemed to be employees of the principal contractor.

NRS 616.090 "Employer" defined. "Employer" shall be construed to mean.

1. The state, and each county, city, school district, and all public and quasi-public corporations therein.

2. Every person, firm, voluntary association, and private corporation, including any public service corporation, which has any natural person in service.

3. The legal representative of any deceased employer.

NRS 616.105 "Independent contractor" defined. "Independent contractor" means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only, and not as to the means by which such result is accomplished.

NRS 616.115 "Subcontractors" defined. "Subcontractors" shall include independent contractors.

NRS 616.260 Exemption of Employer and workman temporarily within state.

1. Any employee who has been hired outside of this state and his employer shall be exempted from the provisions of this chapter while such employee is temporarily within this state doing work for his employer if such employer has furnished industrial insurance coverage under the industrial insurance act or similar laws of a state other than Nevada so as to cover such employee's employment while in this state, provided:

(a) The extraterritorial provisions of this chapter are recognized in such other state; and

(b) Employers and employees who are covered in this state are likewise exempted from the applica-

tion of the industrial insurance act or similar laws of such other state.

The benefits under the industrial insurance act or similar laws of such other state shall be the exclusive remedy against such employer for any injuries, whether resulting in death or not, received by such employee while working for such employer in this state.

2. A certificate from the duly authorized officer of the industrial commission or similar department of another state certifying that the employer of such other state is insured therein and has provided extra-territorial coverage insuring his employees while working within this state shall be prima facie evidence that such employer carried such industrial insurance.

NRS 616.270 Employers to provide compensation; relief from liability.

1. Every employer within the provisions of this chapter, and those employers who shall accept the terms of this chapter, and be governed by its provisions, as in this chapter provided, shall provide and secure compensation according to the terms, conditions and provisions of this chapter for any and all personal injuries by accident sustained by an employee arising out of and in the course of the employment.

2. In such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this chapter otherwise provided.

NRS 616.370 Rights and remedies conclusive and obligatory on employers and employees.

1. The rights and remedies provided in this chapter for an employee on account of an injury by accident sustained arising out of and in the course of the employment shall be exclusive, except as otherwise provided in this chapter, of all other rights and remedies of the employee, his personal or legal representatives,

dependents or next of kin, at common law or otherwise, on account of such injury.

2. The terms, conditions and provisions of this chapter for the payment of compensation and the amount thereof for injuries sustained or death resulting from such injuries shall be conclusive, compulsory and obligatory upon both employers and employees coming within the provisions of this chapter.

The Arizona Workmen's Compensation Law provides:

§ 23-901. Definitions

In this chapter, unless the context otherwise requires:

1. "Award" means the finding or decision of the commission of the amount of compensation or benefit due an injured employee or the dependents of a deceased employee.

2. "Commission" means the industrial commission of this state.

3. "Compensation" means the compensation and benefits provided by this chapter.